SUPREME COURT OF THE UNITED STATES.

No. 117.

DECEMBER TERM, 1866.

AMOS & J. E. KENDALL, APPELLANTS,

vs.

THE UNITED STATES.

AGREEMENT OF COUNSEL TO AMEND RECORD.

At a Court of Claims held at the Capitol, in the city of Washington, on Wednesday, the 25th day of April, A. D. 1866.

AMOS & J. E. KENDALL
vs.
THE UNITED STATES.

The above-entitled case is submitted on petition of appeal to the Supreme Court of the United States.

At a Court of Claims held at the Capitol, in the city of Washington, on Thursday, the 21st day of June, A. D. 1866.

AMOS & J. E. KENDALL
vs.
THE UNITED STATES.

The appeal in the above-named case is allowed, and ordered to be certified as prayed for by claimant's in their petition.

A true copy of record.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Court, at Washington, this 16th day of October, A. D. 1866.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Attest: JOS. CASEY,
Chief Justice.

2 In the Supreme Court of the United States, December term, 1867.

A. & J. E. KENDALL
vs.
THE UNITED STATES. } No. 117.

It is stipulated that it appears by the record in this case that on the 21st day of June, A. D. 1866, the Court of Claims allowed the appeal prayed for by the claimants in their petition set forth in the transcript, and ordered the statement and specification of the alleged errors contained in the said petition to be certified to the Supreme Court of the United States.

It is further stipulated, that the transcript be taken as amended in this behalf, as if upon certiorari.

E. P. NORTON,
Solicitor for the United States.

CARLISLE & McPHERSON,
For App'ts.

In the Supreme Court of the United States.

DECEMBER TERM,—1867.

AMOS KENDALL & JOHN E. KENDALL, *Appellants,*
vs.
THE UNITED STATES, *Respondents.*
No. 19.

Appeal from the Court of Claims.

Facts as found by the Court of Claims as agreed upon by stipulation in the record.

1. That, on the 12th of July, 1843, the Western Cherokees, having a claim against the Government, entered into an agreement with the Plaintiffs (Record p. 13) to allow them five per cent. upon all sums that might be collected on their claim, and authorized the proper officer of the United States to pay them that amount, "to be received directly from the United States, without any further act, or authority by, or from the said Cherokees, west."

2. That under the agency of the Plaintiffs there was awarded to the Western Cherokees, on their claim, $887,480.15.

3. The United States were duly notified of this agreement, and recognized Plaintiffs as the agents of the Western Cherokees, made a treaty with them, and appropriated money ($887,15) to pay them.

4. That before said money was paid to said Western Cherokees Plaintiffs applied to the United States for payment of their five per cent., which was not paid.

5. That the Government retained $67,940 of the amount awarded to pay claims against the Western Cherokees, but no part of the money appropriated was paid to Plaintiffs, nor did the Cherokees ever pay them the amount claimed under said agreement, but the balance of said moneys was paid to said Western Cherokees individually.

6. That by said treaty the Western Cherokees, as a nation, became extinct and united with the other Cherokees and formed an Indian nation called Cherokees, the property of both parties of the Cherokees becoming common property, and consequently not liable to be used by the Western Cherokees in paying their debts.

QUESTIONS OF LAW.

FIRST. *By the agreement the Plaintiffs acquired a lien upon the fund, secured by their agency.*

This is one of those plain principles of law, about which there can be no dispute. This lien exists in numerous instances without the formality of an agreement, or assignment, as in the cases of mechanics making repairs, carriers rendering services, and consignees making advances, &c.

SECOND. *Congress had no power to change, or annul this lien.*

Liens, when once created, can only be discharged or modified by the party interested in them. Congress has no power over any such subjects. They are created under the common law, and the National Government has no authority

to change that law between individuals having obligations under it. The lien was a private matter between parties competent to contract, and they alone could discharge it by a legal agreement. Their competency to contract was admitted by the Government in making with the same persons, the treaty under which they secured the right to the $887.15 48

THIRD. *The United States knew of, and were notified of this lein, which amounted to an assignment, and was bound to recognize it, and act accordingly.*

At law it has been supposed that demands could not be split up by assignment, and the debtor compelled to pay his debt to several claimants. But this rule has never been extended to cases in equity. In foreclosure, and other cases, numerous separate liens have been recognized in the order in which they accrued, and enforced by the Court. Even at law, those who assume that partial payments of demands cannot be enforced, cannot avail themselves of this position, when they do not assume and rely upon it when called upon for payment. In this case no such ground was taken by the Government, and it cannot, at this late day, be set up as an answer to Plaintiffs' demand.

The Defendants, by their own admission in this case, paid out $67,940 of the moneys growing out of this very treaty, in discharge of several separate demands upon these Western Cherokees, when there was not even the formality of an assignment or lien, but a simple debt, the existence and amount of which the Government chose to determine, and without any evidence that those presenting them had claims

better authenticated, or more conscientious and loyal than that of the Plaintiffs. After recognizing and paying these numerous split-up claims, the Government cannot legally, equitably, or conscientiously take the ground that partial claims cannot be recognized. The practice of the Government, the Plaintiffs may justly trust, as its own understanding of its rights and duties, which others may expect will be uniformily acted upon with all. The case of *McElrath vs. McIntosh* (1 Law Reporter, New Series, 399) shows the custom of the Government, in cases like the present. The Government cannot now say, that it can do things, as a matter of favor to one, which another cannot demand as a matter of right. No such principle can be sustained or tolerated. When there was no agreement, Secretary Marcy recognized a common law lien, determined its extent and paid it to the amount of fifteen per cent. on the sums collected as agency fees. Here the parties agreed upon the extent, (very small,) admitted the performance of the duties creating it, and requested the Government to pay, and the negative action of the Government alone stands in the way of payment according to the contract. It is claimed that this cannot stand in the way of payment by the Government, and that it was its own fault that it parted with the funds out of which it was agreed to be paid.

FOURTH. *The Government, by its own acts, having prevented the Plaintiffs from receiving their pay, and having put it out of the power of the Western Cherokees to pay them, and having caused their extinction as a separate tribe, is bound to pay them the amount due them from the Claimants with the Western Cherokees, under the contract.*

The question who constitute nations, competent to contract, is a question for the political branch of the Government. The Western Cherokees were recognized by the Government as competent to contract, and hence the Government made a treaty with them. If they were competent to make a treaty, they were clearly authorized to made an obligatory contract; and the United States must recognize their authority in both instances. The Government, by the exercise of the treaty making power, during the services of the Plaintiffs, wiped out the nation it contracted with, merged it into another, having entirely different, if not hostile, interests, without providing for the interests of the Plaintiffs, of which it has been apprised from the begining of their services.

If we admit, that these things are within the power of the National Government, it does not authorize the course pursued by it in this case. It knew of the Plaintiffs' agreement, of its performance on their part, and the impossibility of their receiving their just compensation, if the Western Cherokees were forbid from paying for their services and even extinguished as a nation. These things were done by the Defendants while Plaintiffs had no means of protecting themselves from loss. Under these circumstances, the Court must hold that the Plaintiffs are entitled to the relief they ask.

R. H. Gillet

No. 19.

A. & I. E. Kendall

vs

The U States.

Mr Gillett

Brief for appellants

Supreme Court of the United States.

AMOS AND JOHN E. KENDALL,
Appellants,
vs.
THE UNITED STATES.

No 19.
DECEMBER TERM, 1868.

This is an appeal from a judgment of the Court of Claims.

THE CASE.

Under several treaties with the United States made prior to the year 1835, portions of the Cherokee tribes of Indians, residing in North Carolina, Tennessee and Georgia, were induced to emigrate west of the Mississippi river, and settle upon lands there secured to them by the said treaties. These emigrants thenceforth were known as Western Cherokees or old settlers, and the residue of the tribe remaining east of the Mississippi were known as Eastern Cherokees.

In the year 1835, the United States purchased from the Eastern Cherokees, all their lands east of the Mississippi, and removed them soon after on to the lands occupied by the Western Cherokees. Great dissensions forthwith arose between the two branches of the tribe, and many outrages were committed on both sides. The Western Cherokees denied the right of the Eastern Cherokees to share their lands. The entire price of the lands sold east of the Mississippi had been paid to the Eastern Cherokees, and it seemed unreasonable that they should be provided with new homes at the expense of the Western Cherokees. In order to press their claims upon the United States, the Western Cherokees appointed a delegation to visit Washington, and negotiate with the Government, with authority to employ counsel to aid them therein. The delegation, under this authority, on the 12th day of July, 1843, employed these appellants, under a written

agreement, set out in the finding of the Court, by which it was stipulated that these appellants should be entitled to one-twentieth part of all moneys or other valuable things allowed in satisfaction of said claims, and they were authorized to demand and receive the said portion from the Treasury or from any officer of the United States. (Rec., p. 12.)

The appellants performed the duties undertaken by them, and on the 6th of August, 1846, a treaty was concluded between the United States and the two branches of the Cherokee tribe, by which, among other things, it was assumed that the Cherokee lands east and west were common property, and as the Western Cherokees had not been paid for their interest in the eastern lands, they were entitled to a fair consideration for that interest, and provision was made for ascertaining the amount due, and to be paid them upon that principle.

This amount, it was stipulated, should be distributed per capita, to the Indians, after deducting $50,000 to be paid to the delegation to pay the expenses of prosecuting their claims; and this per capita allowance, it was provided, should not be assignable, but be paid to the Indians themselves, or their legal representatives. The clause directing $50,000 to be paid to the delegation was stricken out by the Senate, without altering the residue of the article in any respect, and with this amendment the treaty was ratified on the 8th of August, 1846. (9 Stat., 871.)

On the 14th of the same month, all the delegates of the Western Cherokees, who had signed the treaty, united in an order endorsed on the contract with the appellants, authorizing and requesting the Secretary of War, being the proper officer of the United States in that behalf, to pay to these appellants the amount stipulated in the said contract. (Rec., p. 27–15.)

No money was appropriated in satisfaction of the said claims until September, 1850, when Congress appropriated for that purpose a sum which with interest allowed by the same act, amounted to $887,480 15. (9 Stat., 556.) Long before this appropriation was made, and at least as early as February, 1849, (Rec., p. 27) the United States had notice of the

assignment so as aforesaid made by the Indians to these appellants, and again after the appropriation was made, and before any part of it was paid out, these appellants gave notice of the said assignment, and demanded of the proper Department their part of the said moneys, which was refused. (Rec. p. 27.)

The Department retained $67,940 to pay claims against the said Indians, and paid over the residue to them individually, (Rec. p. 28,) in such way as to afford no opportunity to these appellants of collecting anything from the Indians. What was done with the amount retained by the Department is not disclosed by the record.

The appellants then petitioned Congress, and the claim was referred to the Court of Claims, which has given judgment for the United States.

Points.

I. *The contract and order given by the Indians operated as a valid assignment of one twentieth part of the amount due the Indians.*

The right of a creditor to assign his debt in whole or in part is stated by Story in his Eq. Jur., sec. 1044, and supported by the cases there cited, viz:

Smith and Everett, 4 Bro. Ch. R. 64.
Lett and Morris, 4 Sim. R. 607.
Marten *vs.* Naylor, 1 Hill, N. Y. R. 583.
Watson *vs.* Duke of Wellington, 1 Russ. & M., 605.

Also—

Brown *vs.* Carvalho, 4 M. & C. 699.
Row *vs.* Dawson, 1 Ves. Sr. 331.
Taylor *vs.* Bates 5 Cow. 376.
Wheeler *vs.* Wheeler, 9 Cow. 34.
Patteson *vs.* Hull, 9 Cow. 747.
Legh *vs.* Legh, 1 B. & P. 447.

The contract of July 12, 1843, authorizing the appellants to receive the amount from the United States, and the order of Aug. 14, 1846, directing the Secretary of War to pay were each a sufficient assignment of a part of the fund.

9 Stat 41 July 29, 46

"In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor, out of such funds, is a binding, equitable assignment of so much of the fund." Burns *vs.* Carvalho, 4 M & C., 699. See Story Eq. Jur., sec.

The rights of assignees are recognized and protected in courts of law.

Prescott *vs.* Hull, 17 Johns. 284.
Legh *vs.* Legh, 1 B. & P.
Jackson *vs.* Blodgett, 5 Cow., 202.
Littlefield *vs.* Storey, 3 Johns., 426.
Wheeler *vs.* Wheeler, 9 Cow. 34.

II. *Such assignments were not against any statute, nor against the policy of the Government at that time.*

The first act of Congress restricting the right of assigning claims against the United States was not passed till February 26, 1853, (10 Stat., 170) and by the most direct implication it recognized the existence of the right up to that time, and by its terms was made applicable only to transfers and assignments *thereafter made.* And a previous act of July 29, 1846, (9 Stat., 41) which regulated the execution of powers of attorney to draw moneys appropriated in satisfaction of claims allowed by act or resolution of Congress, was made applicable only to claims thereafter allowed. Both of these acts were subsequent to the assignment to these appellants.

No discrimination was made against Indians in the exercise of this right until 1848.

See Opinions of the Attorneys General of 31 March, 1838, Opinions, (Gilpin's Ed.,) 1178.
26 March, 1840, Id., 1303.
Aug. 5, 1848, 5 Opinions, (Hall's Ed.,) 13.

Their capacity to contract and incur debts is recognized by the treaty of 1835 with the Cherokees, in which the United States undertake to appropriate $60,000 to pay the just claims of citizens of the United States against them for services rendered. These services are stated in an opinion of the Attorney General, of April 20, 1837, to have been "professional services," by which we understand services of attorneys and counsel.

In 1848, Gov. Marcy, Secretary War, issued an order prohibiting future assignments by Indians. No earlier order or regulation on the subject is known to us.

III. *Neither the treaty of* 1846, *nor the Act of* 1850 *prohibited the payment of this claim.*

It is true the treaty prohibits the assignment of the per capita, and provides for its payment directly to the Indians, or their legal representatives, and the act directs that the money appropriated be paid to the Indians.

These provisions will not be construed to defeat existing vested rights in the absence of clear and express words requiring such injustice. Such a construction is not required.

1. The provision for a per capita distribution had primarily regard only to the mode of payment. It directed a payment to the individuals of the tribe instead of to the tribe collectively. Indeed the separate existence of the Western Cherokees was extinguished by the treaty of 1846, and when the Act of 1850 passed, there could have been no officers—no treasury—no man or set of men who could have received money due the Western Cherokees. That the provision was not directed against assignees or attorneys of those Indians is evident from the fact that the 4th article of the treaty which prohibits assignments of the per capita allowance, ~~directs~~ that $50,000 be set aside to pay counsel, &c., before the per capita distribution is made—in other words the per capita allowance was the amount distributable to the Indians after deducting from the gross sum the amount assigned to these appellants.

2. It is true that there are in the treaty, provisions intended to secure to the Indian himself the amount due to him, but while the treaty prohibits payment to any agent of an Indian, and prohibits prospectively any assignment of the share of any Indian, it is silent as to any existing assignment, and uses no words applicable to an assignment made by the body of the tribe out of the gross sum. The act of 1850 is more comprehensive in its language, but it was made simply to carry into effect the treaty, and its terms are to be construed in connection with the treaty itself. The purpose of both was, we contend: 1. To prescribe a mode of payment other than payment

to the authorities of the tribe extinguished by the treaty itself; and 2. To protect the individual Indians against fraud and imposition which might be practiced upon them in the long interval between the allowance of the claim and the payment—an interval of more than four years in fact. Had the shares been assignable, probably every one would have been transferred for very inadequate consideration; or still worse, powers of attorney would have been given to persons who would never have paid the Indians any part of the amount received.

3. The contemporaneous construction was that now contended for. The Department withheld $67,940 before making distribution. Rec., p. 28.

The case as stated and found by the court below, is such, that if the same were between private parties these appellants could have recovered the one-twentieth part of the fund by a proceeding, either in the names of their assignors, or in their own names, according to the law of the forum where they sued.

In respect of the form of the proceeding it cannot be pretended that the petition should have been in the name of the Cherokee Indians. This would be at variance with the plain intent of the Act of Congress establishing the Court of Claims. The plaintiff there must always be the *real plaintiff*. The form of proceeding is by petition setting forth a full statement of the claim, and what persons are owners thereof or interested therein, and when and upon what consideration they became interested. It is neither a proceeding technically at common law, nor in equity, nor in admiralty, as to *mere form*.

See the act establishing the court and that amendatory thereto, Sec. 1 Act of Feb. 24, 1855, X Stat., 612.
Sec. 12, Act of March 3, 1863, XII Stat., 765.

Conclusion.

It is submitted that the judgment of the Court of Claims should be reversed, and the csae remanded with directions to enter judgment for the appellants.

J. M. CARLISLE,
JNO. D. McPHERSON,
for Appellants.